BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Program Access	)	
Rules and Examination of Programming Tying	)	MB Docket No. 07-198
Arrangements	)	

REPLY COMMENTS OF TIME WARNER INC.

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February 12, 2008

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By its attorneys, Time Warner Inc. ("TW") hereby submits these reply comments in response to the Notice of Proposed Rulemaking ("*Notice*") in the above-captioned proceeding.[1]

I. Introduction and Summary

TW demonstrated in its comments that the Commission does not have the authority to adopt regulations restricting wholesale bundling or imposing a standstill during program access disputes. Likewise, TW shows below that the Commission does not have the authority to require mandatory arbitration during program access disputes. No commenter in this proceeding provided a credible analysis to the contrary. Moreover, even if the Commission had the authority to adopt the proposed rules, doing so without a sufficient evidentiary record -- which is completely lacking here -- would violate the First Amendment.

In the 1992 Cable Act, Congress expressly directed the Commission to "rely on the marketplace, to the maximum extent feasible," and regulate only where the market is clearly

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[1] *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd. 17791 (2007) ("*Notice*" or "*2007 Program Access Order*").

defective.[2] Numerous commenters documented the many ways in which competition in the video marketplace is thriving. Every day, new sources of content are introduced across multiple platforms, and the myriad choices available to consumers are challenging programmers and distributors alike to provide consumers with the highest quality programming at the best possible prices. In a marketplace *more competitive* than Congress could have imagined in 1992, it is passing strange that some commenters call on the Commission to enact *more regulations*. The Commission should reject these proposals. In adopting the program access rules, Congress stated its preference for the free market, indicating that "it is not the Committee's intention . . . to dictate the outcome of . . . marketplace negotiations."[3] It should not be the Commission's intention either.

II. There Is No Reason For The Commission To Restrict Programmers From Offering MVPDs Discounts For Carriage of Multiple Networks.

There is no evidence in the record that would justify adoption of an anti-bundling regulation. Moreover, such a regulation would exceed the Commission's authority and violate the First Amendment.

A. Proponents Of An Anti-Bundling Regulation Have Provided No Evidence That Supports Adoption Of Such A Regulation.

Several commenters assert that offering programming networks to MVPDs in discounted bundles impedes competition in the video marketplace and harms consumers.[4] However, these

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[2] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(b)(2), 106 Stat. 1460, 1463 (1992) ("1992 Cable Act").

[3] *See* S. Rep. No. 102-92 at 35-36 (1991) (Senate Report accompanying 1992 Cable Act).

[4] The *Notice* incorrectly conflates discounted bundling with "tying." *See, e.g.,* TW Comments at 21-22; Viacom Comments at 15-16. Antitrust courts have made clear that tying only occurs when a seller has market power in a product and specifically conditions sale of that product on the purchase of another product. *See, e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 12 (1984) (stating that the "essential characteristic of an

(footnote continued…)

commenters provided no evidence that discounted bundles have either effect, nor could they given the presence of over 500 national networks today, the ease with which such networks enter the market,[5] and the expansive choice and diversity such networks offer consumers.

Bundling is a prevalent practice throughout our economy, and provides numerous benefits that have been extolled by Congress, the Commission, the courts and leading economists. For example, the Antitrust Modernization Commission, a bipartisan commission of leading economists appointed by President Bush and Congressional leaders to suggest reforms to the antitrust laws, recently observed that "[l]arge and small firms, incumbents, and new entrants use bundled discounts and rebates in a wide variety of industries and market circumstances."[6] It further noted that "[f]irms can use bundling to save costs in distribution and packaging, to reduce transaction costs for themselves and their customers, and to increase reliability for customers."[7]

(…footnote continued)

invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms"). As demonstrated by TW and others, no cable network or programming distributor has the market power requisite for a tying arrangement. *See, e.g.,* TW Comments at 21; Viacom Comments at 6-7 ("no party dominates the market for the sale of video programming, and no program owner has market power"); Fox Comments at 20 ("no program supplier has market power and new programmers and networks enter freely into the market"). Likewise, the prevailing practice today by programmers that offer discounted bundles is to offer their networks on a standalone basis. *See e.g.*, TW Comments at 21, Disney Comments at i, 49; Fox Comments at 1-2, 16-17; Viacom Comments at 2; and NBC Universal Comments at 38. Thus, the factual circumstances necessary for a tying claim are not present in the video marketplace. Moreover, even if tying did occur, that conduct is already comprehensively covered by the antitrust laws.

[5] The Commission identified 565 national programming networks in 2006, almost double the number of networks reported only five years ago. *Compare* Press Release, FCC*, FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report* at 4 (Nov. 27, 2007) (reporting an increase of 34 networks over the 2005 total of 531 networks) *to Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd 1244 ¶ 157 (2002) (reporting a total of 294 satellite-delivered national programming networks in 2001).

[6] Antitrust Modernization Commission, *Report and Recommendations* at 94 (Apr. 2007), *available at* http://www.amc.gov/report_recommendation/amc_final_report.pdf.

[7] *Id.* at 95 (cited in Disney Comments at 27).

Likewise, in its recent decision in *Cascade Health Solutions v. PeaceHealth*, the U.S. Court of Appeals for the Ninth Circuit explained that bundled discounts "generally benefit buyers because the discounts allow the buyer to get more for less."[8] The Commission has also found that bundling "may result in economic efficiencies, including consumer benefits and the lowering of production costs."[9]

Commenters demonstrated that these benefits are also evident in the video marketplace. For example, Viacom showed that "wholesale packaging of video programming has fostered the growth of diverse programming channels,"[10] and Fox noted that "[p]rogrammers often use packaged sales to launch new programming channels, including those that provide programming targeted to niche audiences."[11]

Despite these benefits, some commenters urged the Commission either to prohibit bundling or force programmers to offer networks on a standalone basis. These parties, however, provided no evidence to show a marketplace failure that might justify regulation in this area. To the contrary, as TW and several other commenters have demonstrated, the marketplace is highly competitive.[12] Nor did proponents of an anti-bundling regulation provide any evidence to show

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[8] 502 F.3d 895, 906 (9th Cir. 2007).

[9] *Applications for the Assignment of License from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and the Transfer of Control of Interests in Alaska DigiTel, L.L.C. to General Communication, Inc.*, Memorandum Opinion and Order, 21 FCC Rcd 14863, ¶ 104 (2006).

[10] Viacom Comments at 14.

[11] Fox Comments at 29. Even the American Cable Association ("ACA"), which supported some regulation of wholesale bundling, recognized that the "sale of bundles of channels can result in efficient transactions that provide programmers, distributors and consumers with desired content at reasonable prices." ACA Comments at 21.

[12] *See, e.g.,* TW Comments at 1, 11-12; NCTA Comments at 2-7 (explaining that the "current marketplace for multichannel video programming services bears no resemblance to that which existed in 1992, when Congress adopted Section 628" and stating that "[g]iven this vibrant competition, this is hardly the time for the Commission to

(footnote continued…)

that wholesale bundling harms consumers. In fact, as Disney demonstrated, there is an "insufficient nexus between the wholesale and retail video programming markets" to provide any basis for the concern that bundling forces MVPDs to incur costs that are passed on to subscribers in the form of higher rates.[13] Likewise, Fox showed that even if the Commission prohibited wholesale bundling, there is no reason to believe that MVPDs would offer networks to consumers a la carte.[14]

In short, there is no factual record demonstrating that competition has in fact been impeded or consumers harmed. Moreover, even if a sufficient factual record had been developed, no clear nexus has been (or could be) shown between those hypothetical issues and the proposed regulation of wholesale bundling. Furthermore, a requirement that programming be offered on a standalone basis would be superfluous. As numerous commenters explained, programmers already offer MVPDs the opportunity to purchase networks for sale on an individual basis.[15]

(…footnote continued)

impose new regulation under Section 628"); Comcast Comments at 1-6 (noting that "[g]iven intense competition in the creation, aggregation, and distribution of programming, no expansion of the program access rules is justified"); Fox Comments at 2, 19-21 (the "modern video programming market is tremendously competitive"); Viacom Comments at 1, 3-8 ("[i]n a market so replete with competition, where no firm has market power, governmental intervention would pose a serious risk of harm to consumers.").

[13] Disney Comments at 59.

[14] *See* Fox Comments at 31-32. *See also* Viacom Comments at 20 ("There is simply no basis to assume that prohibiting packaging at the wholesale level would have an impact on program bundling to consumers at retail.").

[15] *See* Disney Comments at i, 49 (Disney "offers its most popular cable programming . . . on a standalone basis."); Fox Comments at 1-2, 16-17 (Fox "makes all of its broadcast and cable programming services available for purchase to all MVPDs . . . on a standalone basis."); Viacom Comments at 2 ("Viacom does not require any MVPD to purchase any channel that the MVPD does not want to carry."); NBC Universal Comments at 38 (NBC Universal's carriage proposals "set[ ] forth proposed per-subscriber rates separately for each linear cable network") (emphasis in original).

B. The Commission Lacks Statutory Authority To Adopt An Anti-Bundling Regulation And Such A Regulation Would Independently Fail Constitutional Analysis.

The anti-bundling regulation proposed by commenters would also violate the Communications Act. No provision of the Act gives the Commission authority to limit or ban wholesale bundling. Section 628(b) -- like the rest of the program access statute -- is aimed solely at preventing vertically integrated programmers from favoring cable operators over non-cable MVPDs. There is no indication in the language or legislative history of Section 628(b) that Congress intended to empower the Commission to go far afield of this purpose to ban or limit the sale of networks to MVPDs in packages.[16] As Fox pointed out, "by its very terms, Section 628(b) is limited to providing the Commission with the power to ensure that MVPDs have access to channels owned by vertically integrated programmers. The law does not provide the FCC with a blank check to regulate the entire process by which cable channels are sold."[17] Additionally, the Commission cannot rely on its ancillary authority under Sections 4(i) and 303(r). As Disney explained, since carriage negotiations do not constitute "communications by wire or radio," any restrictions on bundling would be "ancillary to nothing."[18] And, the

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[16] *See, e.g.,* TW Comments at 6-8.

[17] *See* Fox Comments at 33-35. *See also* Disney Comments at 10-11 ("If Congress had intended to prohibit, or empower the Commission to prohibit, tying or bundling, it simply could have added such practices to the text to Section 628(b) or subsequent sections . . . Because tying and bundling are unlike the examples of prohibited conduct provided by Congress in Section 628(c), the FCC does not have the authority under Section 628 to preclude them."); Viacom Comments at 27-28 ("all Section 628 addresses is access to programming. Congress did not give the Commission carte blanche to regulate the way programming is sold.").

[18] Disney Comments at 16-17 (citations omitted).

Commission is obligated to construe its authority in ways to avoid -- certainly not to create -- constitutional deficiencies.[19]

Independent of the requirement to construe the statute narrowly, any restriction on discounted bundling would violate programmers' First Amendment rights. No commenter has provided non-conjectural evidence of a problem in need of redress, and there has been no demonstration in the record of any "important or substantial"[20] governmental interest that would justify any restriction on programmers' free speech rights. TW and other commenters have shown that competition is thriving and, in the Commission's own words, "the vast majority of Americans enjoy more choice, more programming and more services than any time in history."[21] Indeed, as Viacom, Fox, and NBC Universal showed in the economic study attached to their comments, in the past seven years, there has been "active entry of new providers into video programming network sales and active expansion of the number and variety of networks offered to MVPDs."[22] Not only do consumers have more choices, they are also getting higher quality for less money. As Disney's economist explained, "when quality (as measured, for example, by the number of channels carried or the number of hours viewers watch cable programming) is taken into account, real cable prices have actually declined in recent years."[23]

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19 *See* TW Comments at 8-9 (citing relevant court precedent).

20 *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) ("*Turner*").

21 *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd. 1606 ¶ 4 (2004).

22 Bruce M. Owen, *Wholesale Packaging of Video Programming* 28 (Jan. 4, 2008) (attached to Viacom, Fox, and NBC Universal Comments).

23 Jeffrey A, Eisenach, *Economic Implications of Bundling in the Market for Network Programming* ¶ 88 (Jan. 4, 2008) (attached to Disney Comments).

Even assuming there was real, non-conjectural evidence sufficient to substantiate an "important or substantial" governmental interest, any regulation addressing that interest would only be upheld "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[24] The *Notice* appears to suggest that an anti-bundling regulation will further the Commission's avowed interest in lowering retail cable prices.[25] However, the Commission *already* has a narrowly tailored regulation aimed at precisely that interest,[26] and, as Disney points out, Congress *already* has determined that retail cable rates should not be subject to any further governmental regulation.[27] In any event, there is no evidence whatsoever to suggest that an anti-bundling regulation at the wholesale level would lead to lower prices at the retail level, as the narrow tailoring analysis would, at a minimum, require.

Similarly, a wholesale bundling regulation based on a desire to promote a la carte at the retail level would not pass constitutional muster. As shown above, there is no evidence establishing a clear connection between wholesale bundling and retail packaging. Consequently, "there is absolutely no basis for the [Commission] to assume that prohibiting packaging at the wholesale level would have an impact on program bundling to consumers at retail."[28]

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[24] *Turner*, 512 U.S. at 662.

[25] *Notice* ¶ 120 (stating that MVPDs that agree to bundling arrangements incur "costs for programming that its subscribers do not demand and may not want, with such costs being passed on to subscribers in the form of higher rates").

[26] *See, e.g.,* 47 C.F.R. §§ 76.900-.990.

[27] Disney Comments at 79.

[28] Fox Comments at 32.

III. There Is No Basis For Imposing Standstill Requirements During Program Access Disputes.

Several commenters maintain that standstill requirements are necessary to prevent programmers from using temporary foreclosure strategies to withhold programming from MVPDs during a carriage dispute, citing the conditions in the Commission's *News Corp./DIRECTV* and *Adelphia Orders*.[29] These parties misunderstand the Commission's orders.

While the Commission imposed standstill requirements in *News Corp./DIRECTV* and *Adelphia*, it did so only for a narrow subset of programming -- regional sports networks ("RSNs") -- and based on its finding that there is a "limited supply of distribution rights to desirable local sporting events[,]" making few alternatives to these networks available.[30] However, the Commission specifically found that the same circumstances do *not* apply to national networks, and thus declined to impose a standstill requirement for these networks. As the Commission stated, entry into the national programming market is "not hindered by a lack of content" and there is no evidence that "an MVPD's lack of access to [national] programming [networks] would harm competition or consumers."[31] Commenters in this proceeding provided

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[29] *See, e.g.,* NTCA Comments at 34; DISH Network Comments at 5; BSPA Comments at 14; Verizon Comments at 15.

[30] *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation and Subsidiaries, Assignors, to Time Warner Cable, Inc, and Comcast Corporation, Assignees/Transferees*, Memorandum Opinion and Order, 21 FCC Rcd. 8203 ¶ 169 (2006) ("*Adelphia Order*"). *See also General Motors Corporation and Hughes Electronics Corporation, Transferors, and News Corporation Ltd., Transferee, for Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd. 473 ¶ 130 ("*News Corp./DIRECTV Order*").

[31] *Adelphia Order* ¶ 169. *See also News Corp./DIRECTV Order* ¶ 129 ("The record does not support a conclusion that either News Corp. or other MVPDs consider News Corp.'s national and non-sports regional programming networks to be so highly desired by subscribers that they will switch MVPD providers to obtain it if temporarily foreclosed from accessing it on their incumbent providers' systems.").

no evidence of competitive harms from use of temporary foreclosure that would justify reversal of the Commission's findings in the *News Corp./DIRECTV* and *Adelphia Orders*.

Furthermore, the Commission lacks any authority to impose a standstill requirement. No provision of the Communications Act would permit the Commission to force programmers to continue to provide content to MVPDs during a program access dispute, and no commenter in this proceeding showed otherwise. In fact, as TW demonstrated, a rule authorizing a standstill would violate the express language of Section 628(e)(1), which authorizes the Commission to impose remedies *only after* it finds that a programmer has violated the terms of that section.[32] A standstill would require, and dictate the terms of, carriage *before* any determination has been made that the programmer has violated the rules.[33] Moreover, for the reasons discussed in TW's comments, any standstill requirement would violate the First Amendment.[34]

IV. The FCC Lacks Authority to Adopt "Final Offer" Arbitration.

Several commenters urge the Commission to reconsider its decision not to impose mandatory arbitration for program access disputes.[35] The Commission already decided in the *2007 Program Access Order* that there is no record justifying mandatory arbitration.[36]

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[32] TW Comments at 3-4; 47 U.S.C. § 548(e) (providing that "*[u]pon completion of such adjudicatory proceeding*, the Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming" to the aggrieved MVPD) (emphasis added).

[33] *See* Comcast Comments at 16 (citing NCTA Reply Comments in MB Dkt No. 07-29, at 14 (Apr. 16, 2007)) ("As NCTA aptly explained, such an 'extraordinary upending of the right to contract -- and of the ability of complainants to establish unilateral government takeover of distribution arrangements *pendente lite* -- is not found in Section 628 or any other U.S. law. The Commission lacks statutory authority to impose this type of remedy, based on a mere allegation of a rule violation.'").

[34] *See* TW Comments at 9-12.

[35] *See, e.g.,* DISH Network Comments at 6-7; Rural Iowa Independent Telephone Ass'n Comments at 3.

[36] *2007 Program Access Order* ¶¶ 112-113.

Commenters proposing arbitration have offered no new evidence to suggest that the Commission should now change its mind, only four months later. Moreover, such a suggestion is, in effect, a request for reconsideration of the *2007 Program Access Order*, which is untimely filed.[37]

Mandatory arbitration also would violate the Alternative Dispute Resolution Act ("ADRA"),[38] which the Commission has incorporated into its rules.[39] ADRA prohibits federal agencies from requiring parties to consent to arbitration in order to "ensure that the use of arbitration is *truly voluntary* on all sides."[40] ADRA reflects the long-standing rule that a party "cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[41]

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[37] Petitions for reconsideration of the *2007 Program Access Order* were due on November 5, 2007. The Commission has found that it cannot "waive or extend, even by as little as one day, the statutory thirty-day filing period for petitions for reconsideration in rulemaking proceedings, absent extraordinary circumstances." *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 18 FCC Rcd 7615 ¶ 3 (2003). Because no extraordinary circumstances were cited here, the Commission must dismiss arguments that it reconsider its decision not to impose mandatory arbitration for program access disputes.

[38] 5 U.S.C. §§ 571-584.

[39] *See* 47 C.F.R. § 1.18(b). As TW pointed out in earlier comments, because it is not clear that the Commission ever properly implemented ADRA, the Commission may lack *any* authority to impose mandatory arbitration. *See* Reply Comments of Time Warner Inc., MB Dkt No. 07-29, at 16 (Apr. 16, 2007).

[40] S. Rep. No. 101-543, at 13 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 3931, 3943 (emphasis added); *accord id.* at 3932 ("Participation in the ADR techniques . . . is predicated on the voluntary, informed agreement of all parties to a dispute."); *id.* at 3933 (Congress passed ADRA "to promote more efficient, effective administrative procedures through the use of voluntary, informal procedures"); *id.* at 3936 (ADRA is only constitutional if the "decision to arbitrate" is truly "voluntary on the part of all parties and is subject to the [ADRA's] guidelines"); *id.* at 3937 ("[v]oluntary binding arbitration" is only "authorized when all parties consent, subject to safeguards of judicial review and agency review of the appropriateness of arbitral awards"); *id.* at 3939 (ADRA only allows arbitration "when all the parties to the dispute voluntarily agree to its use").

[41] *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) (quoting *Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 582 (1960)); *see First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 942 (1995) ("[A] party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute."); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 869, 876 (1998) (employees "need not submit fee disputes to arbitration when they have never agreed to do so"); 5 U.S.C. § 575(a)(1) (only allowing arbitration "whenever all parties consent"); *id*. § 572(c) (reaffirming that agency arbitration mechanisms "are *voluntary* procedures") (emphasis added).

Moreover, the Communications Act does not provide any authority by which the Commission can require mandatory arbitration in program access disputes. Section 628 instructs *the Commission* to establish procedures and remedies for program access complaints.[42] Nowhere does it indicate that the Commission can subdelegate its responsibilities to third parties, and the D.C. Circuit has found that "subdelegations to outside parties are assumed to be improper absent an affirmative showing of Congressional authorization," which does not exist here.[43]

V. Conclusion

The Commission lacks any legal or factual basis for making further changes to its program access rules. TW respectfully requests that the Commission not adopt rules that would restrict or prohibit programmers from offering discounted bundles of their networks to MVPDs, or impose standstills or mandatory arbitration in program access disputes.

Respectfully submitted,

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February 12, 2008

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42 *See* 47 U.S.C. § 548(e)-(f).

43 *USTA v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (citations omitted); *see also Mich. Bell Tel. Co. v. Lark*, 373 F. Supp. 2d 694 (E.D. Mich. 2005).